82-987

CASE NO. _____

IN THE UNITED STATES SUPREME COURT

OCTOBER, 1982 TERM

ORISON F. MCDONALD, II

AND

HERBERT DARRELL BOMAR

Petitioners

VS.

THE STATE OF TEXAS

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS

DATE FILED: December, 1982

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QUESTIONS PRESENTED FOR REVIEW

1. Does Article 4, Section 2, Clause 2 of the United States Constitution and 18 U.S.C., Section 3182 in light of Michigan v. Doran, 439 U.S. 282 (1978) prohibit a Court in the asylum state from inquiring into the demanding state's motive, which would be a reversal in principle of Innes v. Tobins, 240 U.S. 127 (1916)?

2. Does the Sixth Amendment's speedy trial clause apply to an asylum state's habeas corpus proceeding questioning the legality of one's pending interstate extradition?

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REPORTED OPINION

The only reported opinion is from the Court of Appeals for the Second Supreme Judicial District of Texas, which is reported at 631 S.W.2d. 222 (Tex. Ct. App. - Ft. Worth 1982 pet. for disc. rev. ref'd). The Texas Court of Criminal Appeals denied discretionary review and overruled Motion for Rehearing. Such Court did not issue an opinion. The judgment of the 78th District Court for Wichita County, Texas is included in the appendix hereto.

STATEMENT OF JURISDICTION

The Texas Court of Criminal Appeals refused the Petition for Discretionary Review on the 16th day of June, 1982, and denied the Petitioners' Motion for Rehearing on Petition for Discretionary Review on the 15th day of September, 1982. The Court of Appeals

for the Second Supreme Judicial District of Texas had previously entered judgment and issued its opinion on March 24, 1982.

28 U.S.C., Section 1257(3) grants jurisdiction to the United States Supreme Court for the review of a judgment of the highest Court of a state for enforcement of any right claimed under the Constitution or statutes of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution

Article 4, Section 2, Clause 2

A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to

be removed to the State having Jurisdiction of the Crime.

Sixth Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense. (emphasis added)

FEDERAL STATUTES

18 U.S.C., Sec. 3182: Fugitives from State or Territory to State, District or Territory.

Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority from any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which such person has fled shall cause him to be arrested and secured, and notify the

executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

STATE STATUTES

Minn. Stat. Ann., Vol. 41, Sec. 629.23(1):

When the return to this state of a person charged with crime in this state is required, the prosecuting attorney shall present to the governor his written application for a requisition for the return of the person charged, in which application shall be stated the name of the person so charged, the crime charged against him, the approximate time, place, and

circumstances of its commission, the state in which he is believed to be, including the location of the accused therein at the time the application is made, and certifying that, in the opinion of the prosecuting attorney, the ends of justice require the arrest and return of the accused to this state for trial and that the proceeding is not instituted to enforce a private claim. (emphasis added).

Tex. Code Crim. Pro. Ann., Art. 51.13, Sec. 23(1):

When the return to this State of a person charged with crime in this State is required, the State's attorney shall present to the Governor his written motion for a requisition for the return of the person charged, in which motion shall be stated the name of the person so charged, the crime charged against him, the approximate time, place

and circumstances of its commission, the State in which he is believed to be, including the location of the accused therein at the time the motion is made and certifying that, in the opinion of the said State's attorney the ends of justice require the arrest and return of the accused to this State for trial and that the proceeding is not instituted to enforce a private claim. (emphasis added)

STATEMENT OF THE CASE

This is an interstate extradition case. On March 31, 1981, Petitioners were arrested in Wichita County, Texas on a fugitive warrant originating from a complaint and information filed in the State of Minnesota. The Minnesota Complaint alleged violations of Minnesota security laws in not registering the sale of oil and gas

working interests to a number of Minnesota investors. The Petitioners were discharged from the fugitive warrant on August 31, 1981 because no Governor's warrant has been issued for their extradition. Petitioners were rearrested in Wichita County, Texas on October 23, 1981, pursuant to a warrant issued by the Texas Governor on October 16, 1981.

Petitioners filed a Petition for Writ of Habeas Corpus in the 78th District Court of Wichita County, Texas on October 23, 1981. Petitioners were not granted a hearing on their Petition for Writ of Habeas Corpus until December 11, 1981. At this hearing, Petitioners introduced uncontroverted evidence which showed that the motive of the State of Minnesota in seeking Petitioners' extradition was to aid private citizens of Minnesota in the advancement of their

personal lawsuits. The 78th District Court of Wichita County, Texas granted the State of Minnesota's extradition request on January 11, 1982.

The Court of Appeals for the Second Supreme Judicial District of Texas affirmed the District Court's judgment on March 24, 1982. The Texas Court of Criminal Appeals refused Petitioners' Petition for Discretionary Review on June 16, 1982 and denied Petitioner' Motion for Rehearing on Petition for Discretionary Review on September 15, 1982.

How Federal Questions Were Presented: The questions presented for review in this Petition were first raised in the 78th District Court of Wichita County, Texas by oral and written motions before the Court. The 78th District Court held: (1) Speedy trial applies to the actual criminal

cause, not to extradition. (Trial Court Opinion, Pages B-5 to B-6); and (2) The issue of private claim motive is not cognizable in Court because the Governor of Texas had already considered the issue. (Trial Court Opinion, Page B-6).

Petitioners asserted the issues contained in the Questions for Review in the Court of Appeals for the Second Supreme Judicial District of Texas (Right to a speedy trial pursuant to the Sixth Amendments: Appellants' Brief, pp. 25-27; and Right to inquire into private claim motive: Appellant's Brief, pp. 18-25).

As to Petitioners' Sixth Amendment speedy trial argument, the Court of Appeals held that the Texas Speedy Trial Act was inapplicable to extradition proceedings. (Court of Appeals Opinion, Pages A-5 to A-6).

The Court of Appeals held that the ruling in Michigan v. Doran, 432 U.S. 282, 289 (1978) prohibited inquiry into the motive for the extradition proceedings; thus, the Petitioners' claim that the State of Minnesota had a private motive in seeking extradition was non-cognizable. (Court of Appeals Opinion, A-2 to A-5).

In the Texas Court of Criminal Appeals, Petitioners reurged their right to a speedy trial pursuant to the speedy trial clause of the Sixth Amendment (Petition for Discretionary Review, pp. 13-17) and reurged their right to a Court inquiry into the demanding State's motive in seeking extradition (Petition for Discretionary Review, pp. 5-13). The Texas Court of Criminal Appeals refused the Petition for Discretionary Review and denied Rehearing; thus, no formal opinion was issued by the Court.

The Petition for Writ of Certiorari is directed to the Court of Appeals for the Second Supeme Judicial District of Texas because the Texas Court of Criminal Appeals did not issue an opinion; thus, the Court of Appeals for the Second Supreme Judicial District of Texas was the highest state court to issue an opinion.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

1. THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE EARLIER UNITED STATES SUPREME COURT DECISION, INNES v. TOBIN, 240 U.S. 127 (1916) IN DENYING THE STATE COURT THE RIGHT TO REFUSE EXTRADITION DUE TO THE PRIVATE CLAIM MOTIVE OF THE DEMANDING STATE.

The lower State Courts held that Michigan v. Doran prohibited the State Court from inquiring into the demanding State's motive once the Governor of the demanding State has granted extradition. The result of the lower Court's decision is that federal law is exclusive in interstate extradition and that Michigan v. Doran established the parameters of federal law on extradition.

In fact, the Honorable Judge Keith Nelson of the 78th District Court of Wichita County, Texas stated in open Court that:

"The Court is of the opinion ... that with the exception of some of his constitutional matters which might have been raised, that you are true and correct that the extradition clause of the Constitution of the United States must be complied with and it would preempt any matters pertaining to our Code of Criminal Procedure other than those set forth in the Uniform Extradition Section . . ." (Statement of Facts, Volume 3, Page 7)

Judge Nelson of the 78th District Court of Wichita County, Texas seems to be holding that federal law is exclusive in the area of extradition, which is the effect of the decision of the Court of Appeals for the Second Supreme Judicial District of Texas.

The United States Supreme Court has held that federal law is not exclusive as to extradition. Innes v. Tobin, 240 U.S. 127, 134-135 (1916). As long as the State law does not interfere or conflict with the federal law, the State law is constitutional. Id. Article 4, Section 2, Clause 2 of the United States Constitution and 18 U.S.C., Section 3182 do not cover whether a State Court may inquire into the motive of the demanding State in seeking extradition; therefore, the lower State Courts in this case should have been allowed to inquire into the demanding State's motive pursuant to the principle promulgated in Innes v. Tobin.

The holding in Michigan v. Doran does not concern whether a State Court may refuse to grant extradition because the extradition request was privately motivated. The Honorable Chief Justice Burger provided:

"We granted certiorari to determine whether the Court of an asylum State may nullify the executive grant of extradition on the ground that the demanding State failed to show a factual basis for its charge supported by probable cause." 439 U.S. at 283.

The sole issue in Michigan v. Doran was the proper scope of the probable cause inquiry by a Court located in the asylum State. The right of a State Court to refuse extradition due to the extradition being privately motivated was not at issue in Michigan v. Doran.

Texas law allows the state court to inquire into the motive of the demanding state in seeking extradition. Texas Code of Criminal Procedure Annotated, Art. 51.13, Sec. 23(1) (Texas version of the Uniform Criminal Extradition Act); Ex Parte Bradley, 456 S.W.2d 370 (Tex. Crim. App. 1970); Ex Parte Seffens, 376 S.W.2d 348 (Tex. Crim. App. 1962). The trial court

specifically found that the petitioner's evidence of the demanding state's private motive was uncontroverted. (Trial Court Opinion, Page B-6) Since Texas law allows inquiry into the demanding state's motive, which is not in conflict with federal law, and the evidence of private motive was uncontroverted, the holdings of the Texas courts would have been different if the Texas Courts had interpreted Michigan v. Doran correctly.

Seven States other than Texas, including Minnesota, deny extradition when the demanding state institutes extradition to aid enforcement of a private claim.[1] If the lower state courts were correct in their interpretation of Michigan v. Doran, these seven states and Texas need to know that fact so as to prevent future controversies on the same issue.

[1] State ex rel Nisbett v. Tool, 72 N.W. 53 (Minn. 1897); State ex rel Nemec v. Sheriff of Hennepin County, 181 N.W. 640 (Minn. 1921); State ex rel Fowler v. Langum, Sheriff, 147 N.W. 708 (Minn. 1914) (Minnesota); Ex Parte Offutt, 234 P. 222 (Okla. Crim. App. 1925); Ex Parte Owens, 245 P.2d 68 (Olka. Crim. App. 1926); Ex Parte Maddox, 27 P.2d 171 (Okla. Crim. App. 1933); Ex Parte Johnson, 25 P.2d 1111 (Olka. Crim. App. 1933) (Oklahoma); Hobbs v. State of Tennessee, ex rel (Ala. Ct. App. 1942); Scott v. State, 33 So.2d 390 (Ala. Ct. App. 1948); Russell v. State, 37 So.2d 233 (Ala. Ct. App. 1948); Stubblefield v. State, 47 So.2d 662 (Ala. Ct. App. 1950); Harris v. State, 82 So.2d 439 (Ala. Ct. App. 1955); Bishop v. State, 92 So.2d 323 (Ala. Ct. App. 1957)(Alabama); State ex rel Hourigan v. Robinson, Sheriff, 257 S.W.2d 9 (Tenn. 1953)(Tennessee); Commonwealth ex rel Spivak v. Heinz, Sheriff, 14 A.2d 875 (Penn. 1940) (Pennsylvania); Work v. Corrington, 34 Ohio St. 64, 32 Am.Rep. 345 (Ohio); Klaiber v. Frank, 86 A.2d 679 (N.J. 1952)(New Jersey); Ex Parte Kuhns, 137 P. 2d 84 (Nev. 1913)(Nevada).

Forty-eight states, including Texas and Minnesota, have adopted versions of the Uniform Criminal Extradition Act. Minn. Stat. Ann., Vol. 41, Sec. 23(1). Section 23, Subdivision 1, the Minnesota version of the Uniform Criminal Extradition Act requires that the prosecutor who is initiating the extradition request certify that the extradition "is not instituted to enforce a private claim". This section of the Uniform Extradition Act is a clear expression of the public policy that extradition is not to be used as a weapon to aid the enforcement of private claims.

As discussed above, eight states, including Texas and Minnesota, prior to Michigan v. Doran permitted courts to deny extradition when the court found that the extradition was instituted in the demanding state to aid the enforcement of a private claim.

Allowing a court to resolve the private motive issue better effectuates the public policy of refusing extradition when it is privately motivated.

A prosecutor is an advocate, not a neutral trier of fact. If the prosecutor is to be the sole judge on the issue of private claims motive, the public policy will clearly be frustrated. As an advocate, a prosecutor by nature will downgrade or ignore evidence of a private claim motive and will be unable to be a neutral trier of the issue of private claims motive. The public policy of not extraditing to aid the enforcement of private claims will be meaningless if the prosecutor is the sole judge on the issue of whether the extradition is privately motivated.

Another problem with allowing prosecutors to be the sole judge on the private claims issue is that the extradition requests are usually form requests in which the prosecutor fills in the blanks. In the case at bar, a Minnesota County Attorney used a pre-printed form in which the Defendant's name, the alleged crime, and other similar information was typed in the blank spaces. The form contained a pre-printed clause to the effect that the extradition was not instituted to aid the enforcement of private claims.

The pre-printed form is an indication of the streamlined procedure used by the demanding state's prosecutor which provides no protection from extradition being used for private motives. The prosecutor may not, and

probably does not, consider whether the extradition is being used as a weapon to aid the enforcement of a private claim. The combination of the adversary characteristic of a prosecutor and the streamlined procedure used in the prosecutor's office clearly stymies the public policy of not using extradition to aid the enforcement of a private claim.

Although the issue of whether a prosecutor or a court should resolve the private claims issue is a question of state law, the issue of whether federal law is exclusive in the area of extradition is a federal issue. Texas and other states had adopted a policy of protecting their citizens from privately motivated extradition prior to Michigan v. Doran. As described above, allowing the prosecutor to be the sole judge on the private claims question

results in a substantial, if not complete, deprivation of an individual's right not to be extradited to aid the enforcement of a private claim. The states have a substantial interest to protect. Federal law, more specifically Michigan v. Doran, needs to be clarified so that the states may protect the rights of their citizens.

If the state courts were correct in their application of Michigan v. Doran, and federal law is exclusive in the area of extradition, the adoption of the Uniform Criminal Extradition Act by the states would be unconstitutional. The Uniform Extradition Act acts within the area of extradition. If federal law is exclusive in the area of extradition, the Uniform Criminal Extradition Act would be unconstitutional since the states would be acting within an area exclusively reserved for federal law.

Either the Texas state courts were wrong in their application of Michigan v. Doran, or the state's adoption of the Uniform Criminal Extradition Act is unconstitutional.

In summary, the Texas courts are holding that federal law is exclusive in interstate extradition. A prior United States Supreme Court holding provides that federal law is not exclusive in extradition. A substantial number of states deny extradition to aid the enforcement of a private claim. Nearly all of the states have adopted the Uniform Extradition Act and are acting within the area of extradition. The granting of certiorari is necessary to clarify the rights of the state in denying extradition and to clarify the apparent conflict between the Texas courts interpretation of Michigan v. Doran, and the Supreme Court's decision in Innes v. Tobin.

2. THE DECISION BELOW DEALS WITH THE SERIOUS AND UNRESOLVED ISSUE OF AN INDIVIDUAL'S RIGHT TO A SPEEDY DISPOSITION OF HIS EXTRADITION PROCEEDING.

The Sixth Amendment to the United States Constitution provides that "(i)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial". The issue at bar is whether a habeas corpus proceeding contesting the legality of one's extradition is a "criminal prosecution" as used in the Sixth Amendment.

The Court has not defined "criminal prosecutions" as used in the Sixth Amendment. As in other areas of constitutional law, a meaningful and workable definition of criminal prosecutions is not possible in light of the varied and complex proceedings to which it may be applied.

The leading case on the meaning of criminal prosecutions is Middendorf v. Henry, 425 U.S. 25 (1976), which involved the issue of whether a military summary court martial is a criminal prosecution. The Court held that a military court martial was not a criminal prosecution for the following two reasons: (1) A proceeding is not necessarily a criminal prosecution because it may result in the loss of liberty or criminal confinement; and (2) the nature of military court martials is fundamentally different from traditional criminal trials.

Two earlier cases were cited as precedent for the Middendorf Court's holding that the possibility of a loss of liberty or confinement does not necessarily result in a proceeding being a criminal prosecution. The first case cited was Gaynon v. Scarpelli, 441 U.S.

778 (1973) in which the issue was what procedural protections are required in a parole revocation hearing. The Court distinguished a parole revocation hearing from a traditional criminal trial in three areas: (1) In a criminal trial, the state is represented by a prosecutor, while in a parole revocation hearing, the state is represented by a parole officer; (2) Formal rules of evidence and procedure are in force in a criminal trial. A parole revocation hearing does not employ formal rules of evidence and procedure; and (3) In a criminal trial, the defendant argues his case before jurors who are untrained in the law. The defendant's presentation in a parole revocation hearing is made to a parole board which consists of individuals knowledgable of the law. Id. at 788-789. The Gaynon Court emphasized the elements of the

traditional criminal trial as contrasted to the similar element of the parole revocation hearing.

The second case cited by the Middendorf Court was In Re Gault, 387 U.S. 1 (1967) in which the issue was the procedural requirements for a juvenile confinement hearing. The Court held that although a proceeding may result in confinement or a loss of liberty, the proceeding is not necessarily subject to the strict procedural requirements of a traditional criminal trial. Id. at 30.

The holding in Middendorf was a product of In Re Gault and Gaynon v. Scarpelli. The Middendorf Court held that the possibility of confinement as a result of the military court martial does not automatically qualify the military court martial as a criminal prosecution. Id. at 38.

The Middendorf Court distinguished between a military summary court martial and a traditional criminal trial in four areas: (1) The Uniform Code of Military Justice substantially differs from civilian criminal codes. Civilian criminal codes regulate a small sphere of civilian conduct, while the Uniform Code of Military Justice regulates a large portion of a serviceman's conduct. The Uniform Code of Military Justice prohibits much conduct which is not prohibited by civilian criminal codes, such as unauthorized absence. 435 U.S. at 38. (2) The punishment for convictions in a summary court martial is limited. Id. at 38-39. (3) An adversary proceeding is a significant element of the Sixth Amendment's right to counsel. A summary court martial is not an adversary proceeding. The presiding officer in a

summary court martial is statutorily directed to protect the interest of the accused as opposed to the neutral function of the judge in a traditional criminal trial. Id. at 39-42. (4) Deference to the special needs and conditions of the military justifies a slackening of the traditional criminal procedural protections as to Court martials. Id. at 42.

Application of the principles promulgated in Middendorf v. Henry, Gaynon v. Scarpelli, and In Re Gault to an interstate extradition proceeding demands that an extradition proceeding be classified as a criminal prosecution. As emphasized in the above three cases, the possibility of confinement and the loss of liberty due to extradition does not automatically qualify extradition as a criminal prosecution. Comparing interstate extradition to a traditional

criminal trial reveals similarities between the two.

Both extradition and criminal trials are prosecuted by attorneys. The rules of evidence are applicable in extradition cases. As in criminal cases, extradition habeas corpus challenges are heard before a judge. Unlike certain military crimes, extradition is based on serious crimes. One can be extradited only for a felony. The punishment imposed upon an individual as a result of being extradited is serious. One who is extradited is forced to defend himself in a strange jurisdiction, post bail or be confined, and acquire living accommodations while defending himself in a jurisdiction which may be several thousand miles away from his home. Where the extradition is being contested in the asylum state the accused is held

to bail and may have habeas corpus relief before a State court much as in a criminal prosecution.

In extradition cases, there are no special circumstances justifying relaxation of procedural protection as there are in court martials or juvenile cases.

Extradition should be considered a criminal prosecution for Sixth Amendment purposes because it has major characteristics similar to a traditional criminal trial, and extradition does not involve any special circumstances which may be present in military court martials or juvenile confinement proceedings.

The Court in Morrisey v. Brewer held that parole revocation is not a stage in a criminal prosecution for Sixth Amendment purposes. 408 U.S. 471, 480 (1972). Three factors were cited as

reasoning behind the Morrisey Court's holding: (1) Parole revocation hearing arise after the end of sentencing; (2) Supervision of parole revocation hearings is not directly by the Court, but by an administrative agency; and (3) Parole revocation deprives individuals of conditional liberty, not absolute liberty. Id.

Applying the Morrisey reasoning to a extradition proceeding produces a different result. Extradition is one of the first steps in a criminal prosecution. Courts directly supervise extradition proceedings. Extradition deprives an individual of absolute liberty. Under the approach used in Morrisey, extradition proceedings should be classified as a criminal prosecution for Sixth Amendment purposes.

Although the loss of liberty or confinement does not per se result in a

proceeding being criminal, the possibility of a loss of liberty or confinement should be the most important factor in deciding whether a proceeding is a criminal prosecution. The major punishment for the traditional crime is confinement. Even where one convicted of a crime is paroled, the conditions upon which one may maintain parole are limitations on individual liberty. During the period between arrest and judgment, the individual is either confined or restrained of his liberty by the conditions of bail. Loss of liberty and confinement are the common elements of a traditional criminal trial and should be considered as important factors in determining whether a proceeding is criminal prosecution.

Interstate extradition involves a substantial loss of individual liberty in two areas. In the home state of the

individual whose extradition is sought, the individual will be arrested and incarcerated unless he can arrange for and afford bail. While released on bail, the individual suffers a serious loss of individual freedom because of the restrictions imposed upon the individual as a condition for his bail, the loss of financial resources used in acquiring bail, the constant burden of the threat of being extradited, and the suspicions, distrust, and contempt of the community of one being under indictment for criminal charges.

The transfer of the individual from his home state to a distant state leads to a grievous loss of individual liberty. Extradition can result in an individual being transferred several thousand miles to a strange and hostile jurisdiction. The individual will be

forced to defend himself in a court far from his home. Substantial sums of money may be spent on acquiring accommodations in the demanding state and traveling to and from the demanding state to his home state. The actual act of extradition results in a substantial sacrifice of individual liberty.

The substantial sacrifice of individual liberty is an adequate basis for classifying a proceeding challenging interstate extradition as a criminal proceeding. Atthough one facing extradition does not face the immediate threat of being imprisoned as is with a criminal conviction, the loss of individual liberties in the home state and the sacrifices of individual liberties resulting from the actual act of extradition are serious and mandate that a habeas corpus proceeding challenging interstate extradition be classified as

a criminal prosecution for Sixth Amendment purposes.

The granting of certiorari is necessary so that the Court can determine the applicability of the Sixth Amendment's speedy trial clause to interstate extradition.

CONCLUSION

Each of the two questions presented for review present serious and unresolved federal and constitutional issues. Petitioners respectfully request that the United States Supreme Court grant certiorari so that the law on extradition can be clarified and the serious and unresolved federal and constitutional issues be resolved.

Respectfully submitted,

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OPINION OF THE COURT OF APPEALS
FOR THE SECOND SUPREME JUDICIAL DISTRICT
OF TEXAS

EX PARTE ORISON F. McDONALD, II
Relator

and

HERBERT DARRELL BOMAR
Relator

631 S.W.2d 221

On the 31st day of March, 1981, appellants were arrested on fugitive warrants based upon complaints filed in the State of Minnesota. An initial Writ of Habeas Corpus was filed on behalf of each appellant in No. 116,534-B. On the 16th day of October, 1981, Governor's warrants were handed down by the Governor of the State of Texas for extradition of the appellants to the State of Minnesota. On October 23, 1981, appellants were arrested and a Petition for Writ of Habeas Corpus was

filed on behalf of appellant McDonald as No. 117,895-B and on behalf of appellant Bomar as No. 117,896-B in the 78th District Court of Wichita County, Texas. The Court consolidated such writs as No. 117,896-B. A hearing thereon was held the 11th day of December, 1981, and the trial court entered its judgment on the 11th day of January, 1982. In that judgment, the trial court denied the habeas corpus relief sought by the appellants and ordered them extradited to the State of Minnesota. From this extradition judgment, these appeals have been taken.

We affirm the judgment of the trial court.

By their grounds of error numbered 1, 2, 3, 4, and 13, appellants complain

that the trial court erred in denying habeas corpus relief and ordering extradition in light of evidence adduced which they contend shows that extradition was brought to aid the enforcement of a private claim, the collection of a debt, the gratification of personal malice and/or for purely private interests.

At the threshold, we note that the United States Supreme Court in Michigan v. Doran, 439, U.S. 282 (1978), at page 289, held that:

Once the governor has granted extradition, a court considering release on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been

charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

We are constrained to hold that this holding circumscribes and limits our scope of review. The case of Ex parte Hatfield, 235 S.W. 591 (Tex. Crim. App. 1921) stands for the proposition that inquiry into the motive for extradition proceeding cannot be considered. Nevertheless, later cases indicate that inquiry into the motive for extradition proceedings is permitted in a habeas corpus proceeding attacking extradition. Ex parte Seffens, 376 S.W.2d 348 (Tex. Crim. App. 1964) and Ex parte Bradley, 456 S.W.2d 370 (Tex.

Crim. App. 1970). We are not directed to any cases, and indeed we find none, decided subsequent to Michigan v. Doran, supra, that would permit inquiry into the motive for the extradition proceedings. Grounds of error 1, 2, 3, 4, and 13 are overruled.

By grounds of error numbered 5 and 12, appellants complain that the trial court erred in denying habeas corpus relief for the reason that they were denied a speedy trial on the extradition request. Again we are not directed to any cases holding that Texas Speedy Trial Act is applicable to extradition proceedings. We feel justified in holding that the Act is not applicable. Cf. Gill v. State, 593 S.W.2d 697 (Tex.

Crim. App. 1980). Grounds of error 5 and 12 are overruled.

By ground of error number 6, appellants urge that the trial court erred in denying habeas corpus relief because "the Governor's warrant and the documents supporting the Governor's warrant were insufficient on their face to establish that a judicial determination of probable cause was made in Minnesota." We disagree.

The documents relating to extradition are to be found in State's Exhibits, RES-1 (relating to Bomar) and RES-2 (relating to McDonald). Each contains a "complaint" singed by one Gary A. LaVasseur charging the appellants with one or more offenses of securities violations under the laws of

Minnesota. Each complaint is seven pages in length, signed before a magistrate of the State of Minnesota. One page seven of each "complaint", the Minnesota magistrate makes a finding of probable cause. Ground of error number 6 is overruled.

By ground of error number seven, appellants urge that the trial court erred in refusing to grant habeas corpus relief because the "complaint" on which the extradition proceedings are brought are based on the complaintant's information and belief. This is sufficient. Ex parte Harris, 389 S.W.2d 668 (Tex. Crim. App. 1965). Ground of error number 7 is overruled.

By ground of error number eight, appellants urge that the trial court

erred in denying habeas corpus relief and in ordering extradition because the State failed to identify the appellants as the persons sought for extradition by the demanding state.

The learned trial judge in his judgment entered on January 11, 1982, held:

The Court then considered the relator's motion to quash the Governor's warrant for reason of improper identity, and having considered the evidence finds the relators herein are duly and properly identified both by name or idem sonans and by pictures in the accompanying papers with such warrant and by relators' own testimony, and such motion is hereby denied.

We hold that the record, as a whole, which we have caretully reviewed, supports these findings of the trial court relative to identity. Ground of error number eight is overruled.

In their ground of error number nine, appellants contend that the trial court erred in denying appellants' Special Plea in Bar because extradition of the appellants would constitute "double jeopardy". We disagree. There can be no jeopardy in a criminal action until a jury is empaneled and sworn. Crist v. Bretz, 437 U.S. 28 (1978). This has not occurred in either Texas or Minnesota. Ground of error number nine is overruled.

By ground of error number ten, appellants contend that the trial court

erred in refusing to admit into evidence and in sustaining a State's objection to a tape recording (and/or transcript thereof) of appellant Bomar's conversation with one Lee Heutmaker in support of their "private claims" motions. Our discussion and holding on grounds of error numbers 1, 2, 3, 4, and 13 dispose of this ground of error, which is overruled.

In their ground of error number 11, appellants contend that the trial court erred in granting extradition and in denying habeas corpus relief in that appellants were restrained of their liberty from March 13, 1981, until August 31, 1981, on the "basis of a fugitive warrant and no Governor's warrant. . . " Again we are referred to

no case law relative to this issue. However, the record does not reflect that either appellant was "restrained of his liberty". Ground of error number eleven is overruled.

Finally, appellants urge the trial court erred in admitting the Governor's warrant and its supporting documents "because they were insufficient as a matter of form substance to contain the necessary requisites to sustain" the appellants' extradition.

V.A.C.C.P. art. 51.13, Sec. 3, provides in pertinent part:

No demand for extradition of a person charged with crime in another State shall be recognized by the Governor unless in writing . . . and accompanied . . . by a copy of an affidavit

before a magistrate there, together with a copy of any warrant which issued thereupon . . .

We have discussed generally, the documents relative to extradition under ground of error number six above. The main document which we referred to as "complaint", signed before a Minnesota magistrate, is an affidavit and it contains a warrant issued thereupon signed by such magistrate. Ground of error number fourteen is overruled.

The judgment of the trial court is affirmed.

OPINION OF THE 78TH DISTRICT COURT
OF WICHITA COUNTY, TEXAS

EX PARTE:)
ORISON F. McDONALD, II,)
ET AL)

On this the 11th day of December, 1981, came on to be heard the Writ of Habeas Corpus heretofore filed herein by Petitioners Orison Fleming McDonald, II, aka Orison F. "Mack" McDonald, II and Herbert Darrell Bomar, aka Darrell H. Bomar, Relators.

The State of Texas was duly represented by and through District Attorney's Office of Wichita County, Texas, with such representation being furnished by District Attorney Timothy D. Eyssen and Petitioners were duly represented by the Honorable Perry Wesbrooks and the Honorable Greg Merkle.

The Court having previously considered motions to consolidate entered an order that Causes 116,534-B, 117,895-B, and 117,896-B be duly consolidated with the surviving cause being Cause No. 117,896-B to be entitled Ex Parte: Orison Fleming McDonald, II, et al.

The Court heard relators' motions for discovery, duly ruled on same.

The Court then considered relators' motion to quash the Governor's warrant for lack of probable cause, and finds that full faith and credit should be given to the demanding state's criminal action, and such motion is hereby denied.

The Court further considered relators' motion to quash the warrant

for lack of information and belief, and finds that full faith and credit should be given duly issued information in accordance with the laws of the demanding state, and such motion is hereby denied.

The Court then considered the relators' motion to quash the Governor's warrant for reason of improper identity, and having considered the evidence finds the relators herein are duly and properly identified both by name or idem sonans and by pictures in the accompanying papers with such warrant any by relators' own testimony, and such motion is hereby granted.

The Court then considered the motion of relators to quash the warrant by virtue of constitutional grounds,

both within the Constitution of the United States of America and the State of Texas, and finds that such constitutional grounds as alleged have not been violated but have been handled in compliance with with requirements of such clauses, and such motion is hereby denied.

The Court then considered the relators' motion to dismiss the extradition by virtue of the reason that the relators were in a Chapter 11 bankruptcy, and the Court duly finds therein that a Chapter 11 bankruptcy is a civil proceeding and further finds that no instruction or order has been issued by the Bankruptcy Courts of the Northern District of Texas or by the Bankruptcy Courts of the State of

Minnesota wherein certain adversary civil litigation filed in such bankruptcy has been duly transferred by the U.S. Bankruptcy Court, Northern District of Texas.

The Court further finds that the extradition clause of the Constitution of the United States provides for and governs the action of not only the state executive but those of the courts of the asylum state, and that such motion is hereby denied for lack of jurisdiction over bankruptcy matters.

The Court jointly considered relators' special pleas in bar and motion to dismiss by virtue of failure to be tendered a speedy trial and finds that a speedy trial is a speedy trial upon the actual criminal cause therein

and not as to extradition, and hereby denies such motion.

The Court further considered relators' motion to quash the extradition warrant by virtue of the fact that the same was issued on private claims and in conjunction therewith finds that although relators' private claim evidence was uncontroverted, the demanding state has certified that no action is being had by virtue of a private claim, and that the Governor of this state duly considered the issue of private claims which was denied by the Governor, and the Court therefore finds that such motion to quash is hereby denied.

The Court, having denied the various motions to quash, finds that the

Governor's warrants issued for relators herein are regular on their face, sufficient in form and contain the necessary requisites to sustain the extradition of the relators. In connection herewith, the Court finds that the Governor's warrants duly issued by the Governor of the State of Texas are supported by the introduced documents from the demanding state, the State of Minnesota, and the same has been properly attested to in form sufficient to meet the requirements of the Uniform Extradition Act as well as the demanding state, the State of Minnesota.

The Court further finds that the Petitioners, relators herein, have been duly charged with a crime as the same is

provided for in the Statutes of the demanding state, the State of Minnesota.

The Court further finds that Petitioners, relators, are fugitives from the demanding state, the State of Minnesota.

Wherefore, premises considered, this Court finds the Petitioners, relators herein, should be remanded to the State of Minnesota pursuant to that state's requisition, and that said Petitioners, relators, are hereby remanded to the Sheriff of Wichita County, Texas, to be incarcerated until the proper authorities from the demanding state, the State of Minnesota, can return said Petitioners, relators, to the State of Minnesota, and the Sheriff is hereby ordered following

completion by relators of appeals, if any, to notify the State of Minnesota and said Petitioners may be released to said Minnesota authorities.

The Court further sets bonds for appeal in this matter at $7,500.00 for each of the relators herein pending any appeals by relators to the Texas or Federal Appellate Courts having jurisdiction.

Entered this 11th day of January, 1982.